imposed on the insurer.[14] It is to be noted, however, that the same rule has sometimes been applied in cases of sales; and New York inconsistently accepts it in the latter branch of law[15] but refuses to follow it in insurance law.[16]

Where an insurance company at the time of the delivery of the policy has knowledge of a breach of a condition, the performance of which by the terms of the policy is a condition precedent to the assumption of any risk, the great weight of authority allows a recovery on the theory of estoppel.[17] Manifestly no estoppel can be based on any reliance on a representation prior to the formation of the contract: such a representation would be as to a future fact. The representation recognized by the courts is one implied from the issuance of the policy, that the contract at that time is binding.[17] It is difficult to see, however, how the insured is entitled to rely on a contemporaneous representation at variance with the terms of a written contract which gives him notice of the effect of the breach of his warranty.[18] This theory of estoppel was evolved from the desire to protect prospective policy holders from the pitfalls of a contract intelligible only to experts;[19] its adoption may, perhaps, be partly attributed to the courts' difficulty in finding a waiver. Since all the negotiations prior to the written contract are merged therein, and the written instrument represents the entire agreement of the parties, it follows by virtue of the parol evidence rule that no statement prior to or contemporaneous with the issuance of the policy can be introduced to modify its terms.[20] For this reason there can be no prior or so-called contemporaneous waiver. There may, however, be a subsequent waiver which will sufficiently protect the insured. On breach of condition the policy is voidable, not void. From its issuance there exists a right to avoid for breach of this condition precedent which may be relinquished either expressly or by implication. If the insurer, having knowledge, either actual or imputed, of facts constituting a breach, later accepts payment of a premium or does any other act in recognition of the validity of the contract, a waiver may properly be implied. The introduction of evidence to show knowledge of the fact by the insurers prior to the issuance of the policy in no way varies the terms of the policy, and clearly does not violate the parol evidence rule. In other contracts there is no objection to a subsequent waiver of a condition broken at the formation of the contract.[21]

THE REQUIREMENT OF PRIVITY IN INTERPLEADER.—It is sometimes said "that the doctrine of interpleader is essentially founded on privity between the parties."[1] This is inaccurate. Where the plaintiff stands in the same

[14]Welsh *v.* London Ass. Co. (1892) 151 Pa. 607: Hubbard *v.* Mut. etc. Life Ass'n. (1897) 80 Fed. 681.
[15]Littlejohn *v.* Shaw (1899) 159 N. Y. 188.
[16]Devens *v.* Ins. Co. (1888) 83 N. Y. 168.
[17]Van Schoick *v.* Fire Ins. Co. (1877) 68 N. Y. 434; Spalding *v.* Fire Ins. Co. (1902) 71 N. H. 441; Vance, Ins. 362; *contra*, Dewees *v.* Ins. Co. (1872) 35 N. J. L. 366.
[18]Cf. Northern Ass. Co. *v.* Building Co. (1902) 183 U. S. 308.
[19]Ins. Co. *v.* Wilkinson (1871) 13 Wall 222.
[20]Union etc. Ins. Co. *v.* Mowry (1877) 96 U. S. 544.
[21]Polhemus *v.* Herman (1893) 45 Cal. 573; cf. Behn *v.* Burness (1863) 3 Best & Sm. 749.

[1]23 Cyc. 11; see also Pom. Eq. Jur. (3rd Ed.) § 1324.

position toward each defendant, interpleader will be allowed even though the defendants are strangers to one another. Thus the common law remedy of interpleader, from which the equitable was derived, was granted to a finder of lost goods against any adverse plaintiffs.[2] And although finding is to-day regulated by statute in most jurisdictions,[3] equitable interpleader lies against defendants who are in no more intimate relationship, such as rival towns attempting to tax property,[4] rival claimants for a municipal office[5] or for a reward,[6] or even for the price of work done under different contracts.[7] It is true that where the plaintiff does not stand in the same position toward both defendants, a certain relationship between defendants is necessary. But that requisite relationship is not privity in the ordinary sense of a status in which one person derives his claim from another or both from the same contract. For a tenant may interplead the heir and devisee of his landlord,[8] a broker the assignees and attaching creditors of his principal,[9] and an insurer the decedent's wife, claiming insurance under one policy, and his executors, claiming under a substituted policy,[10] although there is no privity in the ordinary sense between the defendants. The so-called requirement of privity seems to be merely that if the plaintiff has become a stakeholder by bailment, tenancy, debt, or through a trust, as in a recent case, *Moore Co.* v. *Savings & Trust Co.* (1908) 31 D. C. App. 452, both defendants must claim under, and not adversely to, the original bailor, landlord, creditor, or settlor of the trust.[11]

This restriction does not commend itself either on grounds of policy or authority. The original common law action lay against the plaintiff's bailor and *his* bailor;[12] and the requirement of privity was not made in the early equitable action in England[13] or the United States.[14] The present rule was first established as to landlord and tenant by *Dungey* v. *Angove*[15] in 1794. The apparent ground of the decision was a technical distinction between the subject-matter demanded by the two defendants, the landlord demanding rent, the stranger damages for use and occupation—a distinction that is disregarded in other classes of cases.[16] The real basis of the decision is the tenant's estoppel to deny his landlord's title; but it is to-day settled that a tenant may deny his landlord's title in the interest of the true owner,[17] and there is evidence that this was permissible even at the time of this decision.[18] Yet the case has been generally followed.[19] The rule requiring privity in cases of bailees, agents, etc., was first suggested in a dictum

[2] 2 Story Eq. (13th Ed.) § 803.
[3] 19 Cyc. 540.
[4] Redfield *v.* Supervisors (N. Y. 1839) 1 Clark Ch. 42; but see Macy *v.* Nantucket (1876) 121 Mass. 351.
[5] City of New York *v.* Flagg (N. Y. 1858) 6 Abb. Pr. 296; but see Buffalo *v.* Mackay (N. Y. 1878) 15 Hun. 204.
[6] Fargo *v.* Arthur (N. Y. 1872) 43 How. Pr. 193.
[7] Packard *v.* Stevens (1899) 58 N. J. Eq. 489.
[8] Jew *v.* Wood (1841) 3 Beav. 579.
[9] Sieveking *v.* Behrens (1837) 2 My. & C. 581, 591.
[10] Emerick *v.* Ins. Co. (1878) 49 Md. 352.
[11] Pom. Eq. Jur. § 1326.
[12] Story, Bailments (9th Ed.) § 52.
[13] Stephenson *v.* Anderson (1814) 2 Ves. & B. 407; Morley *v.* Thompson (1819) 3 Madd. Ch. 564, Index, Interpleader.
[14] Atkinson *v.* Manks (N. Y. 1823) 1 Cow. 691, at 703.
[15] (1794) 2 Ves. Jr. 304.
[16] See Vol. I. Part II. Smith's Leading Cases (8th Am. Ed.) 979 *et seq.*
[17] Taylor, Landlord & Tenant (9th Ed.) § 308.
[18] See Surrey *v.* Lord Waltham (1785) cited in Dungey *v.* Angove, *supra*, 305; Shelbury *v.* Scotsford (1602) Yelv. 23.
[19] Snodgrass *v.* Butler (1876) 54 Miss. 45.

in *Pearson* v. *Cardon*,[20] but not definitely established until *Crawshay* v. *Thornton*.[21] In the latter case, the property had been pledged by one defendant to the plaintiff's bailor and by him pledged to the other defendant while it was in the plaintiff's possession. The bill was dismissed because, as it was considered that the plaintiff was liable to the second defendant in any event, and might therefore be liable to both parties, interpleader could not determine the rights of all three parties, and was therefore inappropriate. Aside from the growing belief that the ownership of the property as between the defendants should be settled by interpleader even in cases where the plaintiff would still be liable to one of the parties,[22] no separate liability really attached to the plaintiff in this case. The theory of the court that his mere acknowledgment, without consideration, that he held goods for the defendants, was a warranty of title, and therefore binding, is manifestly unsound, and is not followed.[23] The theory of the court that the plaintiff as bailee was bound to return the property to the bailor, although challenged by one with better title than the bailor, was at no time unquestioned[24] and is not applied to-day in other classes of cases.[25] Yet, although merely dictum in this case, the theory has been followed in interpleader actions.

Twenty-four years later interpleader was re-established at law in England by a statute which was intended to override the "somewhat narrow principle laid down" in that dictum.[26] In the meantime the dictum has been followed in this country, with apparent reluctance. In *Bank* v. *Bininger*,[27] which established the principle with regard to bailees, it was said that, had there been no authority to the contrary, the bill should have been allowed; and an illogical exception to the rule, laid down by the English courts in favor of public warehousemen,[28] has been eagerly seized on in this country and extended.[29] In the leading case denying interpleader to an agent against his principal and a stranger,[30] it was intimated that if the plaintiff had, before bringing the bill, exhausted his legal remedy by trying to get a bond of indemnity from his principal, the bill might have been granted. And in a converse case in which the plaintiff interpleaded his agent and another broker claiming pay for the same services, interpleader has been allowed.[31] The rule has not been applied against a bill by a tenant interpleading his landlord and a stranger to whom the plaintiff had frequently paid rent.[32] And it has been declared inapplicable to a bank interpleading a depositor and one who has begun suit for the deposit.[33] Aside from these exceptions, however, and in spite of the opinions of text-writers[34] and judges[35] that the

[20](1831) 2 Russ. & M. 606.
[21](1836) 2 My. & C. 1.
[22]See 32 Am. Law Rev. 331, 335, *et seq.*
[23]Platte Valley Bank *v.* Bank (1895) 155 Ill. 250.
[24]Shelbury *v.* Scotsford, supra; Ogle *v.* Atkinson (1814) 5 Taunt. 759; but see, *contra*, Nickolson *v.* Knowles (1820) 5 Madd. 47.
[25]Bank *v.* Skelton (1846) 2 Blatch. 14; Biddle *v.* Bond (1865) 6 Best & S. 224.
[26]Attenborough *v.* Dock Co. (1878) L. R. 3 C. P. D. 450.
[27](1875) 26 N. J. Eq. 345.
[28]Cooper *v.* DeTastet (1829) 1 Taml. 177.
[29]See Norris *v.* Schroeder (N. C. 1842) 1 McMul. 422.
[30]Marvin *v.* Elwood (N. Y. 1844) 11 Paige, 365 at 375.
[31]Brooke *v.* Smith (1879) 13 Pa. Co. 557; *contra*, Sachsel *v.* Farrar (1889) 35 Ill. App. 277.
[32]Seaman *v.* Wright (N. Y. 1861) 12 Abb. Pr. 304.
[33]German Exchange Bank *v.* Commissioners (N. Y. 1879) 6 Abb. N. C. 394.
[34]See Pom. Eq. Jur. § 1824, n. 1.
[35]Crane *v.* McDonald (1896) 118 N. Y. 648; Bartlett *v.* His Imperial Majesty (1885) 23 Fed. 257, at 258.

rule is an illogical and inexpedient limitation on a useful remedy, in spite of the fact that a Federal court has ignored the *Crawshay* case and gone back to earlier precedents,[36] and that in some states which have re-established interpleader at law, privity has been declared unnecessary,[37] the conservative tendency of our courts makes it improbable that the rule in the equitable action will be changed, except by statute.

THE ADMISSIBILITY OF HEARSAY EVIDENCE IN BOUNDARY DISPUTES.—Under the exception to the Hearsay Rule which admits reputation to prove matters of public interest, evidence as to the reputed location of public boundaries, *i. e.*, boundaries of counties, towns, highways, etc., is everywhere received.[1] The English courts, construing the exception strictly, have declined to extend it to cases of private boundaries,[2] unless coinciding with such as are public.[3] In the United States, however, outside of Massachusetts and Maine, which adhere to the English view,[4] the exception has been quite generally relaxed to meet local needs. Thus, in a few states, *e. g.*, New York and California, reputation is admitted to prove the boundaries of private grants of a notorious and extensive character;[5] while others admit reputation in all cases.[6] Introduced because of the unavailability of other proof, this extension in its origin finds support in the interest of a rural community in boundaries,[7] the reason for admitting reputation in any case being the trustworthiness gained from the interest and consequent information of the public.[8]

Influenced by the same considerations of necessity, a number of American courts, chiefly in the South and the Northeast, developed a new exception to the hearsay rule, by force of which the declarations of deceased persons, having peculiar means of knowledge and without interest to misrepresent, are admissible on any question of boundary public or private.[9] This exception has no place in English law which excludes a declaration if based solely on personal knowledge.[10] The trustworthy nature of similar declarations has, however, been admitted by English judges,[11] and the exception might have gained a foothold in England were it not for the tendency there prevailing to oppose further breach of the Hearsay Rule.[12] Safeguarded by the disqualification from interest and the freedom of the jury to weigh the credibility of the declarations, this extension appears legitimate. For obvious reasons, however, it is proper to qualify the requirement of "means

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[36]Bank *v.* Skelton, *supra.*

[37]Boyle *v.* Manion (1896) 74 Miss. 572; *contra,* Ins. Co. *v.* Kidder (1904) 162 Ind. 382.

[1]See Wigmore, Ev. §§ 1582-1588 incl., *passim.*

[2]Clothier *v.* Chapman (1805) 14 East 331 n.

[3]Thomas *v.* Jenkins (1837) 6 A. & E. 525.

[4]Chapman *v.* Twitchell (1853) 37 Me. 59; cf. Hall *v.* Mayo (1867) 97 Mass. 416.

[5]Morton *v.* Folger (1860) 15 Cal. 275, 279; McKinnon *v.* Bliss (1860) 21 N. Y. 206.

[6]Wigmore, Ev. § 1587, and cases cited in note 7.

[7]Cf. Harriman *v.* Brown (Va. 1837) 8 Leigh 697.

[8]Morewood *v.* Wood (1811) 14 East 327.

[9]Spear *v.* Coate (S. C. 1825) 3 McCord 227; Higley *v.* Bidwell (1833) 9 Conn. 447; Great Falls Co. *v.* Worster (1844) 15 N. H. 412; Scoggin *v.* Dalrymple (N. C. 1859) 7 Jones L. 46; Stroud *v.* Springfield (1866) 28 Tex. 649.

[10]Outram *v.* Morewood (1793) 5 T. R. 121.

[11]Cf. remarks of Mellish, L. J. in Sugden *v.* St. Leonards (1876) L. R. 1 P. D. 154; of Cockburn, L. C. J. in R. *v.* Bedingfield (1879) 14 Cox Cr. 342; and of Herschell, L. C. in Woodward *v.* Goulstone (1886) L. R. 11 App. Cas. 469.

[12]See opinion of Blackburn, J., in Sturla *v.* Freccia (1880) 5 App. Cas. 623.